IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.6293 of 1997
**

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

DEEPAK @ LANGDO PRATAPSING RAJPUT.. Petitioner
Versus
STATE OF GUJARAT & others .. Opponents

Appearance:
MS KRISHNA U MISHRA for Petitioner
SERVED for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT
Date of decision: 25/11/97

ORAL JUDGEMENT :

The Police Commissioner, Ahmedabad City, on 6th May 1997, passed order of detention invoking his powers under sec.3(2) of the Gujarat Prevention of Anti Social Activities, 1985 (hereinafter referred to as "the Act")

so as to deter the petitioner from carrying out his anti social activities injurious to the maintenance of public order, pursuant to which the petitioner already arrested, is at present under detention. He calls the said order in question challenging its legality and validity.

2. In Amraiwadi Police Station one complaint pertaining to offence under sec.324 of Indian Penal Code came to be lodged against the present petitioner, on 26th January 1997. As per the allegations made in the complaint, the petitioner and his associates had caused injuries giving knife blows. Another complaint came to be lodged with the same Police Station with regard to the offences punishable under secs.326, 294(C) read with sec.114 of IPC and sec.135(1) of Bombay Police Act, alleging that the petitioner demanded the amount of Rs.500/- from the complainant and when the complainant expressed his inability to make payment of the said amount the petitioner lost his temper and becoming wild drew out a knife, which was concealed by him and putting the complainant to imminent danger of violence extorted Rs.100/-. Thereafter on telephone the petitioner threatened the complainant with dire consequences if payment of remaining amount was not made shortly. Thus, he was extorting and robbing the people. As per the third complaint which came to be lodged in Amraiwadi Police Station with regard to offences punishable under secs.386 and 387 of IPC and sec.135(1) of Bombay Police Act, the petitioner repeated likewise offences of robbery and extortion. The Police therefore, thought it fit to deeply inquire into the matter. After inquisition, the Police could see that the petitioner was doing nothing except carrying out illegal activities disturbing maintenance of public order. Putting the people into fear of death or injury, he extorted money or caused injury, so as to achieve his evil-goals. No one was daring to come forward and state against the petitioner, because every one was under fear of violence and no one was ready to invite any trouble endangering his safety. Because of such fear the petitioner became more and more wicked. Free from any obstruction, he was conveniently indulging in anti social activities and gloat. In order to check his activities remedial measures available in law were thought of, but neither of the actions according to the Police Commissioner was found effective. The only way out was to pass the impugned order and detain the petitioner. In the result the order came to be passed and the petitioner was then arrested. It is against that order, the present petition under Article 226 of the Constitution is filed, challenging its legality and validity.

3. Learned advocate representing the petitioner assailed the order on several grounds. But later on confined to the only ground going to the root of the case. When that is so, I will confine to that ground only, without dwelling upon the other grounds. The ground on which the petitioner prefers to challenge the order is regarding exercise of the privilege under sec.9(2) of the Act. In this case the particulars of witnesses who have given statements are not furnished to the petitioner. As the names, addresses, occupations, etc. of the witnesses are not furnished, according to the petitioner, his right to make effective representation was jeopardised because he was not in a position to verify the fact as to whether in fact the witnesses were available for giving statements or whether their entity was doubtful or whether in a camouflage manner the statements were recorded with a view to any how detain him in custody.

4. Against such submission Shri Dave, learned APP has submitted that with all bona fides the statements were recorded, but particulars of the witnesses were not disclosed, because the authority passing the order was worrying much about the safety of those witnesses. If the facts indicating identity of the witnesses were disclosed, the petitioner would have taken advantage thereof and witnesses might not have remained alive today. It was, therefore, against public interest to disclose those particulars. The omission will not in any way be fatal to the opponents' case.

5. It would be better if the law about non disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual materials which led to inference namely not to disclose the certain facts, but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and section 9(2) of the Act the detaining authority is

empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non disclosure has to be exercised sparingly and in those cases where public interest dictating non disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statements against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry or study the case personally applying his mind. What can be deduced from such constitutional as well as legal scheme is that the obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has therefore to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. He can entrust the task of inquiry to any one else found fit for the purpose but in that case also he has to take decision only after application of mind to all the facts and circumstances on record. If he mechanically endorses or accepts the recommendation of that person or officer in that behalf, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fides. For my such view, a reference to a decision in the case of Bai Amina, w/o Ibrahim Abudl Rahim Alla v. State of Gujarat and others, 22 GLR 1186, held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel v. State of Gujarat & others, 35

(1)[1994(1)] GLR 761, may be made.

6. In view of such law made clear by this Court in the aforesaid decision, the authority passing the order has to show that he made personal inquiry applying mind and felt satisfied for the exercise of the privilege. A perusal of the copy of order produced at page 12 in clear terms shows that the authority passing order entrusted the task of inquiry to his subordinate who recorded statements, verified the fact and then made report to the authority passing the order. It seems that the authority then mechanically accepted the opinion and the fear expressed by the witnesses in their statements without personally applying the mind as to whether the fear expresses was bona fide or genuine and was not imaginary or fanciful. It may be noted that the authority has also not filed his affidavit explaining how the inquiry was made and he reached the conclusion for exercising discretion vested in him vide section 9(2) of the Act. In view of the matter it cannot be said that the discretion exercised is just and proper. When that is so it was incumbent upon the authority to furnish the particulars withheld. When those particulars are not given, as submitted by the petitioner, he could not verify the facts and genuineness thereof. He also could not study his case so as to prepare available defence and then make effective representation against the order. In short his right to make effective representation has been marred. In the result the order of detention and continued detention are bad in law. The order of detention is, therefore, required to be quashed.

7. For the aforesaid reasons the order of detention being illegal and invalid is hereby quashed and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule is made absolute accordingly.

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